

Impact of Criminal Convictions in the Immigration Process

Moral character is a serious issue in the process for a Green Card. This means that if an applicant for the Green Card has a criminal conviction, however minor, s/he may be denied a Green Card and in some instances the United States Department of Homeland Security, particularly US Immigration and Customs Enforcement (ICE) will actively seek to deport those individuals by initiating “removal” proceedings. Although mere arrests may not lead to deportation, they may raise questions as to the character of the applicant seeking a Green Card. Likewise, an individual may not even have been arrested, but issues relating to visa fraud may affect the application for Permanent Residency status triggering suspicions as to the applicant’s fitness of character. Thus, where discretion is widely used in granting Immigration benefits such as the Green Card, applicants must be careful how they disclose and address issues relating to their moral character.

Moral character is defined by the Immigration & Nationality Act in various sections. While it seems clear that if a person has been arrested or even convicted of a crime, s/he should seek legal advice from a criminal defense attorney, but if that individual is an immigrant, then s/he MUST also seek professional representation or advice from a competent Immigration attorney. Failure to disclose events that US CIS may discover will result in two problems: the fraud or misrepresentation of omitting relevant information regarding the applicant’s character and once that event is discovered, the immigration consequences of the underlying event.

Determining what to disclose and how is necessary BEFORE submitting an application for Permanent Residency status or going to the Green Card interview also known as the “adjustment of status” interview. Even if the applicant has NEVER been arrested for a crime, merely admitting to something under oath in front of an Immigration Officer MAY affect the decision in that case. For those individuals who do not have an issue of an undisclosed crime, but who have a conviction as a matter of court record, these individuals may be eligible for a hardship waiver based on the impact deportation would have on a qualifying US citizen immediate relative or Lawful Permanent Resident relative. In most cases, an applicant for the Green Card may overcome the burden of proving good moral character if a waiver application is submitted, however, there are those who may encounter more complicated problems. Waiver applications are submitted in conjunction with the application for Permanent Residency or are requested by the Immigration Officer at the interview.

Waivers would apply most frequently to those applicants who have convictions for petty or “petit” offenses which are deemed “misdemeanors” in the state criminal court context. These are for crimes that resulted in imprisonment of less than 6 months or less than one year. An analysis of the factors surrounding the conviction and the sentencing is necessary to determine which crimes in which contexts could allow an Immigration waiver. It should be noted that some petit crimes depending on surrounding circumstances may be deemed “aggravated felonies” for immigration purposes. One such example is battery. Depending on the context of the battery, it may be re-characterized as an aggravated offense because of the degree of violence. A battery that occurs in a domestic violence context or a battery with a weapon may take the crime out from a “petit” offense level elevating it to a crime for which the perpetrator may be deported.

Usually if the sentence for the crime was imprisonment for more than one year, then the applicant may have a serious burden to overcome as these crimes may not only be considered felonies in the state criminal court context, but may also fall into the Immigration and Nationality Act “aggravated felony” definition. An “aggravated felony” for Immigration purposes under the current Immigration Laws renders the applicant for a Green Card permanently barred from certain relief and may result in deportation for life. This also applies to someone who is already a Lawful Permanent Resident. Thus, those individuals who already have a Green Card are not immune from deportation or having immigration problems. While I state that an “aggravated felony” will most likely result in permanent deportation, other types of convictions could also result in the initiation of removal proceedings. There are always exceptions to the information stated above so each case should be examined carefully to determine how it will be affected in the Immigration context.

If an individual is already a Lawful Permanent Resident, how does s/he trigger removal proceedings? This occurs, generally, when a Lawful Permanent Resident leaves the country on vacation and is returning to the US, or when the applicant applies for naturalization. As fingerprinting and Federal Bureau of Investigation back ground checks are routine before an applicant is approved for an Immigration benefit, US CIS will discover the criminal record. Also, as airport security becomes increasingly meticulous, US Immigration Border Patrol and Customs Inspectors have databases available to them that notifies them of a traveler’s criminal history.

What can an applicant or Lawful Permanent Resident do if they have a conviction be it a misdemeanor or felony? Sometimes, the conviction can be re-opened in the state criminal court context and the decision overturned. This often occurs if during the plea stage, the defendant was not advised of the immigration consequences of entering a guilty or no contest plea. Also, if there were other errors in procedure that rise to the level of a constitutional violation, the conviction may be overturned and the reason for deportation could be eliminated. It should be noted, however, that re-opening a criminal court case could result in re-trial for the initial charges. Retaining the services of a good criminal defense attorney will be effective. Not everyone will be able to afford a good criminal defense attorney, or have the time to re-open a criminal case if they are already in the midst of removal proceedings. There may be other alternatives available to defeating deportation. The date of the conviction and laws in effect at the time of conviction may be helpful in defeating the deportation proceeding. Generally, however, merely expunging or sealing a record at the state court level will not hide or remove the conviction from the Federal Bureau of Investigation record or immigration database.

Therefore, while some individuals may be eligible for waiver applications which allow them to still obtain a Green Card despite blemishes in their character or criminal record, others may have more arduous hurdles to overcome. An individual who is an immigrant with a criminal conviction, be it a petit offense or felony, must seek immigration advice before submitting an application or leaving the country.